IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-3300 and 06-3457

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

v.

STEVEN J. PARR,

Defendant-Appellant,
Cross-Appellee.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
CASE NUMBER 04-CR-235
HONORABLE WILLIAM C. GRIESBACH, PRESIDING

BRIEF OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

STEVEN M. BISKUPIC
United States Attorney

Attorney for Plaintiff-Appellee/
Cross-Appellant

530 Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-297-1700

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JURISDICTIONAL STATEMENT

The jurisdictional statement of defendant-appellant/cross-appellee is not complete and correct.

The district court had jurisdiction pursuant to Title 18, United States Code, section 3231 and the underlying criminal statute, Title 18, United States Code, section 2332a(a)(3). The district court's judgment was entered on August 18, 2006. The defendant filed a timely notice of appeal on August 25, 2006. On September 12, 2006, the United States filed a timely notice of appeal. On December 20, 2006, the Solicitor General approved the cross-appeal of the United States.

This Court has appellate jurisdiction over this matter pursuant to Title 28, United States Code, section 1291 and Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

I. Whether Parr's conviction for threatening to blow up a federal building, in violation of Title 18, United States Code, section 2332a(a)(3), violated the First Amendment.

II. Whether the district court abused its discretion in admitting evidence under Fed.R.Evid. 404(b) that Parr wanted to be the next Timothy McVeigh or Unabomber; that Parr possessed books detailing how to make explosives; that he had experimented with chemicals and explosives in the past; and that he had previously spoken of his desire to blow up a building.

III. Whether the district court committed plain error requiring a new trial because the court, in the context of an evidentiary ruling on the McVeigh evidence, mistakenly referred to the defendant as "Mr. McVeigh."

IV. Whether the district court properly admitted expert testimony to explain Parr's technical description of explosive material and to opine on Parr's ability to construct a large explosive device.

V. Whether the district court properly calculated the advisory Guidelines, but acted unreasonably in reducing Parr's sentence to 120 months from the advisory range of 360-months-to-life based on the court's view that imposition of the terrorism enhancement, U.S.S.G. section 3A1.4(a), overstated the seriousness of the offense.

VI. Whether Parr's sentence violated the Sixth Amendment right to a jury trial.

STATEMENT OF THE CASE

A. Indictment

On October 5, 2005, a federal grand jury in the Eastern District of Wisconsin returned an indictment against the defendant, Steven J. Parr. R. 1.[1] The indictment charged that Parr had threatened to use a weapon of mass destruction against property leased and used by the United States and departments and agencies of the United States, in violation of Title 18, United States Code, section 2332a. *Id*. The property targeted was the Reuss Federal Plaza in Milwaukee, Wisconsin. *Id*. Parr was arraigned on October 13, 2005, and entered a plea of not guilty to the charge against him. R. 9.

B. Trial and Motion for Judgment of Acquittal

A jury trial, presided over by United States District Judge William C. Griesbach, began April 24, 2006, and on April 27, 2006, the jury returned a verdict of guilty. R. 146.

Parr moved for judgment of acquittal under Fed. R. Crim. P. 29. R. 149. This motion was denied by the district court on July 10, 2006. R. 157.

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[1] "R." followed by a number refers to an entry on the district court's docket sheet; "PSR" followed by a number refers to a paragraph of the presentence investigation report; "Tr." followed by a number refers to a page in the trial transcript; and "Sent. Tr." followed by a number refers to a page in the sentencing transcript. "Exh." followed by a number refers to trial exhibits.

C. Sentencing

On August 16, 2006, a sentencing hearing was held. R. 166. The district court imposed a sentence of 120 months' imprisonment. The sentence was 240 months below the minimum of the advisory guideline range. The formal judgment was entered by the district court on August 18, 2006. R. 167.

D. Appeal

On August 25, 2006, Parr filed a notice of appeal. R. 169. On September 12, 2006, the United States filed a notice of appeal. R.174.[2]

[2]The Solicitor General approved the cross-appeal of the United States on December 20, 2006.

STATEMENT OF FACTS

A. Background

Steven Parr was a 39-year-old resident of Janesville, Wisconsin, who in 2003 began a state prison sentence for distribution of marijuana. Tr. 43, 243-45. During a two-year period between being charged with the marijuana offense and the start of his prison sentence, Parr told neighbors and friends that he wanted to blow up a government building. Tr. 10, 16, 209-10. Parr spoke of Timothy McVeigh, who destroyed the federal building in Oklahoma City, as "a hero." Tr. 9-10, 29. Parr also talked of his admiration of Ted Kaczynsky, the "Unabomber," who had killed people by sending bombs through the mail. Tr. 10, 29. Parr took the nickname of "Uni" and that nickname, along with a drawing of a bomb, was tattooed on his upper left arm. Tr. 78.

Parr's fascination with explosives went beyond solely verbal admiration for McVeigh and Kaczynsky. Parr studied chemistry and collected books and pamphlets which contained detailed explanations on how to construct various types of explosive devices. Tr. 6-7, 27, 61-69, 209, 227, Exhs. 20-46. One such booklet included an explanation on how to make a large bomb using fertilizer. Tr. 69, Exh. 46. Another had a section, which Parr had marked, on targeting government buildings. Tr. 65, Exh. 35. Parr himself constructed and detonated

explosive devices – usually pipe bombs. Tr. 8, 26, 211. According to one of Parr's girlfriends, she saw Parr construct about a dozen pipe bombs. Tr. 26. Another girlfriend said that she was with Parr when he set off an explosive device on an island in the Rock River near Janesville. Tr. 9.

Parr did not hide his bomb-making intentions from others. He showed one neighbor a barrel of granules that he said was to be used for constructing explosives. Tr. 209-10. He told another neighbor that he had enough explosive material "to blow up the whole neighborhood." Tr. 220. Both neighbors later testified that Parr was serious when making statements about explosives. Tr. 217, 225.

B. Oshkosh Correctional Institution

Parr served the bulk of his state sentence at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Tr. 43. In August of 2004, Parr was assigned a new cell mate, John Schultz. Tr. 266. Schultz was serving multiple sentences for sexual assaults Tr. 266. Parr was scheduled for release in September 2004 and began talking to Schultz about a plan to blow up a federal building in Milwaukee when he was released. Tr. 275, 310-11.

According to Schultz, Parr discussed his hatred of the federal government in words going beyond the "run-of-the-mill" inmate complaints. Tr. 310. Parr

described the building in Milwaukee as one made predominantly of glass and said it "was a perfect target." *Id.* Parr said he had already examined the building and gave Schultz specific details of his plan. Tr. 311. Parr also described his access to chemicals and his prior history of constructing explosive devices. Tr. 268-74. Schultz, who himself had a background in chemistry, was convinced that Parr's threat was serious. Tr. 368, 309.

Unbeknownst to Parr, on August 23, 2004, Schultz wrote to the FBI and Secret Service warning them of Parr's intention. Tr. 44; Exhs. 6-7. FBI agents then met with Schultz and convinced him to record a conversation with Parr. Tr. 290-91, 310.

On September 20, 2004, the day before Parr was to be released from prison to a halfway house, Schultz secretly recorded a long conversation with Parr in their cell. Tr. 52-53, Exhs. 1-2. Their exchange included highly technical discussions on the components of potential explosives, including mercury fulminate, Trinitrobenenzine, oxidizers, urea nitrate, as well as various types of detonators and other aspects of an explosive device. *Id.* The exchange also included the following.

Parr: My attitude is changing.

Schultz: Your attitude is changing?

Parr: Yeah.

Schultz: I don't blame ya. The feds deserve it more than anybody, but you know, you gotta be careful because there's gonna be other people in that building besides just feds.

Parr: Then they shouldn't be there. They should understand the risk.

* * *

Schultz: That's what I, a long time ago when you were telling me about that, I said, when you let that off on a street that's not even gonna damage that building cause it's too far away from the street.

Parr: Not necessarily. I mean you're gonna break every window in the place. And you'll do more damage to people with flying shards of glass as shrapnel than you will structurally to the building.

Schultz: So, how far away from the street is that building?

Parr: In Milwaukee?

Schultz: Yeah.

Parr: Ah, less than 25 feet.

Schultz: Really? And there's nothin' to obstruct nothin'. You can just drive right up and do it.

Parr: I believe so. I've seen delivery trucks. I, I believe there's no problem whatsoever.

Schultz: So you can just pull right up there and do it.

Parr: Yep.

Schultz: Is there anything on the other side of the street?

Parr: Yeah. Grand Avenue Mall.

Schultz: (laughs) Oh my God. You're gonna fuck that up too then.

Parr: Yep.

Schultz: Tellin' ya.

Parr: A good way to minimize the ah innocent people.

Schultz: Mm mh.

Parr: And to increase effectivity of the bomb itself.

Schultz: Right.

Parr: Would be to line one side of the truck with steel plate.

Schultz: The other side. The opposite side.

Parr: Right.

Schultz: It's the side away from the federal building.

Parr: Right.

Schultz: So, that, that would just blow off onto the street then. Can't you let the bomb off at night time?

Parr: Sure.

Schultz: That way you won't, there won't be any people floatin' around.

Parr: But then you won't have people in the feder-, federal building either.

Schultz: Oh, that's true.

Parr: Except the fuckin' janitors and who wants to hurt them?

Schultz: (laughs) Excuse me. Yeah, that's a good point. Who wants to get janitors. Fuckin' janitors. Boy that would make a statement dude. Do you know what happen if that, if that went down. Do you know this whole country would just become just like fuckin' Soviet Union. There wouldn't be a fuckin', goddamn, fuckin' person movin'.

Parr: It would sure change the attitude of the country.

Schultz: Fuck ya.

Parr: Thinkin' it was New York, and LA.

Schultz: Oh.

Parr: And Washington and here it comes to down home America.

Schultz: Right to Milwaukee. Right to downtown Milwaukee.

Parr: I think it would make a wonderful statement.

* * *

Schultz: Oh yeah. So, you're, you're sayin' you just wanna watch the aftermath.

Parr: Right.

Schultz: You don't actually want to watch it blow up.

Parr: Well, I don't think I could be in a safe position to watch it go off.

Schultz: Yeah, you better get...

Parr: You're gonna have, you're gonna to be protected and anything that is good enough to protect you is gonna blind your field of vision.

Schultz: Right.

Parr: Like a, like another building.

Schultz: Even a block away, you're gonna be, you're gonna get fucked up. How many drums would you use if you were, would,

would a van be enough? Or would you need a Ryder truck like McVeigh used.

Parr: I'd go for a delivery truck.

Schultz: How many drums you figure? Ten?

Parr: Mm, if that.

Schultz: Okay, ten drums and how many pounds of detonator? A couple pounds?

Parr: Mm, on ten drums, oh golly, maybe four or five.

Schultz: Pounds?

Parr: Yeah.

Schultz: And then you give yourself like a three minute fuse cause you know people are gonna be lookin' at that truck awful suspicious.

Parr: Mm mh. I'd go to Farm and Fleet and get me a set of Work n' Sport brown pants

Schultz: Mm mh.

Parr: And a brown button shirt.

Schultz: Right.

Parr: Get some sort of silly little, little ah name tag patch to make it look official. Get myself a little ah clipboard.

Schultz: Right. And then what?

Parr: Walk in the building.

Schultz: In the building?

Parr: (U) Yeah, walk in the building, turn right around and walk back out.

Schultz: And just keep walking.

Parr: Yep, just keep walking.

Schultz: And then as soon as you get around the corner, run like hell.

Parr: Fuckin' right.

Schultz: (laughs)

Parr: And I would definitely have earplugs in.

Schultz: Why? Is it gonna be kind of loud?

Parr: Oh, it will be extremely loud. Echoing off the buildings and . . .

Schultz: Does that fuckin' federal building take up a whole block?

Parr: Several.

Schultz: It takes up several blocks?

Parr: Yeah.

Schultz: Well then you're not gonna be able to bring the whole thing down like . . .

Parr: Ah, no, probably not . . .

Schultz: Cause he . . .

Parr: But it's all glass. The damage that will be done will just be complete.

* * *

Parr: I'm just gonna stick with small shit for, for awhile. Refine my techniques.

Schultz: Mm mh.

Parr: Try some new formulas.

* * *

Schultz: The, you're not gonna be able to make a fuckin' goddamn fuckin' firecracker without them fuckin' knowin' it. Not a fuckin' firecracker buddy. But I get the feeling they're gonna fuck with you one time too much and you're gonna let em have it.

Parr: Could very well be. I wouldn't put it past me. You know my attitude has really gone down hill these last few years. Especially after my son. That, that was just the straw that broke the camel's back.

Schultz: So if you were gonna get one, who, eh, you 'member you said you can only get one now.

Parr: Yep.

Schultz: So the first one's gotta be the right one.

Parr: Yup.

Schultz: So, I might not have to wait ten years? Is it possible?

Parr: Absolutely.

Schultz: Cool.

Parr: I might find something better than Milwaukee too.

Schultz: Like what?

Parr: I don't know, when I when I see it. If I ever see something that's a better target, I'll know.

Schultz: Then that'll be the one that gets it.

Parr: Yep.

Schultz: Right now it's Milwaukee though.

Parr: It's the best one I know of at this point.

* * *

Parr: Yep. The states are subservient to the feds.

Schultz: I see. So you think by blowing up the federal building that's gonna fuckin' change somethin'.

Parr: I hope it'll make people aware. I hope others will say, wow, he can stand up and make a statement like that? I may not be as radical as him, but I surely agree with him and it might unite more people. It might generate some people to stand up and say, you know what? Enough is enough.

* * *

Schultz: Don't you think you'll need some help to do this or can you do it all by your little self.

Parr: I probably could do it alone, but I'm the type of person that it's no fun doing it alone. I want someone else to watch, and to see what I did.

Schultz: Mm. You wanna be, you wanna be the McVeigh of the world.

Parr: Yeah, the next McVeigh.

Schultz: Well, let me tell you something, after you blow the federal building up and they catch your ass, you'll be the McVeigh. You know they're gonna give you the death penalty.

Parr: Sure.

Schultz: And you don't care.

Parr: No.

* * *

Parr: I was thinkin' more along the lines of having a small ah diversionary type thing to attract their attention. Say um, a phone call saying, there's a bomb in the building, something like that which will attract all the government employees. This, the innocent people will evacuate but the, the officers will congregate . . . .

* * *

Schultz: So all this shit that you been tellin' me is not just all bullshit. Someday, someone's gonna get it, I hope right?

Parr: Absolutely.

Schultz: No doubt about it.

Parr: No doubt.

Schultz: Someone's gonna get it.

Parr: Someone's gonna get it.

* * *

Schultz: So, you're not worried about fuckin' tellin' me this shit.

Parr: Well, if I get any heat, I'll kill ya.

* * *

Schultz: Well, I know it will be in the national news, whatta you think I'm dumb? Your face is gonna be all over. You're gonna be Timothy McVeigh.

Parr: Well, don't get me wrong, I'm gonna do everything I can to not get caught, I just don't see it happening.

Exh. 2A.

C. FBI Interview

Parr was released from Oshkosh Correctional and taken to a halfway house in Janesville, Wisconsin. *See* Tr. 42; Exh. 16. State authorities, however, having been alerted by the FBI to Parr's statements, moved Parr to a county jail. There, on September 29, 2004, FBI executed a federal arrest warrant for Parr's arrest. After signing a waiver of rights form, Parr was interviewed by the FBI. Tr. 72-73.

Parr asked whether his jail cell conversation had been recorded. Tr. 75. FBI agents did not tell him that a recording existed. Tr. 75. Thereafter, Parr denied making any statement about blowing up a federal building. Tr. 75. Parr said his cell mate was the person who wanted to blow up a building. Tr. 75. Parr denied that he himself had ever described how he would blow up the building, including how he would wear a disguise or that it would make a "wonderful statement" to blow up a federal building. Tr. 75-76. He denied being anti-government and said he had never been involved in making explosive devices, including pipe bombs. Tr. 76-77. Parr also denied threatening to kill his cell mate if the plot was exposed. Tr. 78. Parr said his "uni" bomb tattoo was because of his explosive personality. Tr. 78.

D. Reuss Federal Plaza

The Reuss Federal Plaza building in Milwaukee is a predominantly glass structure, with two connected towers, located on Wisconsin Avenue, a main downtown thoroughfare. Tr. 70, Exhs. 50-59. In September of 2004, the federal government leased office space in the Reuss building for approximately 23 federal agencies. Tr. 72, 240, Exh. 49. The federal offices in the building included the IRS, OSHA, the military, Social Security, INS, the National Labor Relations Board, and a United States Senator. Tr. 240-41. Approximately 820 federal

employees went to work there each day. Tr. 240. The building is located across the street from the Grand Avenue Mall, a downtown shopping center. Tr. 71.

SUMMARY OF ARGUMENT

Steven Parr was properly convicted of threatening to blow up a federal building, in violation of Title 18, United States Code, section 2332a(a)(3). The conviction did not run afoul of the First Amendment because Parr uttered a "true threat." *See United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986). The evidence of Parr's true threat included a secretly recorded jail-house conversation, made the day before Parr's scheduled release, wherein Parr set forth in detail his plan to destroy the Reuss Federal Plaza in Milwaukee. Moreover, the evidence at trial established that Parr had proven bomb-making capabilities, was obsessed with explosives, repeatedly expressed hatred for the government, and idolized Timothy McVeigh and the Unabomber.

At trial, the district court did not abuse its discretion in admitting evidence under Fed.R.Evid. 404(b) that Parr wanted to be the next McVeigh or Unabomber; that Parr possessed books detailing how to make explosives; that he had experimented with chemicals and explosives in the past; and that he had previously spoken of his desire to blow up a building. This evidence, presented in limited fashion and with a cautionary instruction to the jury, specifically addressed a matter in issue at trial: whether Parr was serious and intended to be serious when he recounted his plan to blow up a federal building. In addition,

the district court did not commit plain or reversible error when, in the context of considering testimony that Parr had spoken favorably of McVeigh, the court mistakenly referred to Parr as McVeigh. The court immediately corrected its mistake and apologized. No bias was shown and the mistake did not prejudice Parr.

The district court also did not commit error, plain or otherwise, in allowing the government to introduce expert testimony explaining and evaluating Parr's words about making a large explosive device. The defense contended that Parr had no detailed knowledge of explosives and was simply putting forth false bravado. His words on a recorded conversation, however, contained detailed, highly technical descriptions of explosive material: mercury fulminate, Trinitrobenenzine, oxidizers, urea nitrate. *See* Exh. 1; *see also* Tr. 362-65. Parr also discussed the various necessary components of a large explosive "train": the detonator, the booster, and the main charge – but not without certain technical errors. Tr. 365. The district court did not abuse its discretion in allowing expert testimony explaining these terms and the conclusion (disputed by Parr's own expert on the subject) that Parr was, in fact, capable of constructing an explosive device that would destroy a federal building in Milwaukee.

The district court properly calculated Parr's advisory sentencing guideline range at 360 months to life, but the district court acted unreasonably in reducing Parr's sentence to 120 months based on the court's view that imposition of the terrorism enhancement, U.S.S.G. section 3A1.4(a), overstated the seriousness of the offense. In so ruling, the district court substituted its judgment for the policy considerations of the guidelines and erroneously failed to consider the seriousness and danger presented by Parr's threat.

Finally, regardless of Parr's ultimate sentence, his sentencing hearing did not violate the Sixth Amendment. Parr was sentenced under the procedures of the *United States v. Booker*, 543 U.S. 220 (2005). The recent Supreme Court case of *Cunningham v. California*, 127 S. Ct. 856 (2007), did not overrule the "Booker fix" and, therefore, Parr's sentence does not violate the Sixth Amendment.

ARGUMENT

I. Parr's conviction did not violate the First Amendment. The evidence at trial was sufficient for a reasonable jury to find Parr guilty beyond a reasonable doubt.

Parr challenges his conviction by arguing that his conduct was protected under the First Amendment. He specifically contends that he did not engage in a "true threat" so as to be guilty under Title 18, United States Code, section 2332a(a)(3).

A. Standard of Review

In arguing that his conduct did not, in fact, violate the law, Parr challenges the sufficiency of the evidence against him. The district court rejected this contention in a post-trial Order Denying Rule 29 Motion for Judgment of Acquittal. R. 157. This Court reviews *de novo* the denial of a motion for judgment of acquittal under Fed.R.Crim.P. 29. *United States v. Hausmann*, 345 F.3d 952, 955 (7th Cir. 2003); *United States v. Irorere*, 228 F.3d 816, 830 (7th Cir. 2000). Where First Amendment concerns are raised, the Court also reviews *de novo* whether criminalization of the alleged conduct impermissibly infringes on free speech rights. *See United States v. Fuller*, 387 F.3d 643, 646-47 (7th Cir. 2004); *see also Watts v. United States*, 394 U.S. 705, 707-08 (1969); *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986).

B. Title 18, United States Code, Section 2332a.

Parr was indicted on one count of threatening to use a weapon of mass destruction against property leased and used by the United States and departments and agencies of the United States, in violation of Title 18, United States Code, section 2332a.

The relevant portion of section 2332a reads:

> (a) a person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction– . . . (3) against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States [shall violate federal law.]
>
> * * *
>
> (c) Definitions. – For purpose of this section– . . . (2) the term "weapon of mass destruction" means– (A) any destructive device as defined in section 921 of this title.[3]

Section 2332a was enacted in 1994 as a part of the Violent Crime Control and Law Enforcement Act of 1994. *See United States v. Wise*, 221 F.3d 140, 148, n. 10 (5th Cir. 2000). The particular statutory language of section 2332a was added to the anti-terrorism provisions of Title 18, though the vast majority of the 1994 legislation dealt with general law enforcement or "cops-on-the-beat" issues. *See*

[3] Section 921(a)(4) of Title 18 defines "destructive device" as "any explosive, incendiary, or poison gas– (i) bomb, . . . or (vi) device similar to any of the devices described in the proceeding clauses."

H.R. Conf.Rep. No. 103-711, section 10002 (1994). Congress justified section 2332a by finding that the use or threatened use of weapons of mass destruction would gravely harm the national security interests of the United States, as well as "disturb the domestic tranquility" of the country. *See* Buckman, *Validity, Construction, and Application of 18 U.S.C.A. Section 2332a Prohibiting Use or Threat, Attempt, or Conspiracy to Use Certain Weapons of Mass Destruction*, 199 A.L.R.Fed. 1 (2005), at section 2(a) (citing H.R. Conf.Rep. No 102-405). "The original version of the statute aimed only at use or attempt to use or conspiracy to use weapons of mass destruction. It neither mentioned threats at all, nor did it allude to the interstate commerce connection." *Id.* Those provisions were added as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996). *Id.*

The protection of persons residing in federal buildings, however, has been in the statute since its enactment. *See* 18 U.S.C. section 2332a (West 1995). Congress' authority to protect the country, and federal property in particular, through legislation of this type cannot seriously be questioned. *See United States v. Bin Laden*, 92 F. Supp.2d 189, 220 (S.D.N.Y. 2000).

C. Essential Elements

In evaluating the sufficiency of the indictment, as well as the evidence presented at trial, the district court determined that section 2332a(a)(3) had three essential elements: (1) that the defendant threatened to use a weapon of mass destruction; (2) that the threat was against property owned, leased or used by the United States or any of its departments or agencies; and (3) that the threat was a true threat. R. 157, Order Denying Rule 29 Motion for Judgment of Acquittal at 2.

The "true threat" element was required to remove Parr's words from the general protection of the First Amendment. *See Fuller*, 387 F.3d at 647. A "true threat" was defined by the district court as:

> the statement attributed to the defendant was made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage the Reuss Federal Plaza. You must also be satisfied that the defendant intended his statement to be understood in that manner. A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is not necessary that Par actually intended to use a weapon of mass destruction to damage the building or that he had the capacity to do so. Nor it is required that he communicate the threat to anyone connected with the Reuss Federal Plaza.

R. 157 at p. 2. *See also* R. 135-1, Revised Decision and Order on Defendant's Motion To Exclude Rule 404(b) Evidence, at 4-15 (reviewing case law on "true threat"). The district court's determination of the essential elements of the offense, including the definition of a "true threat," was consistent with the prior, though limited reported cases under section 2332a. *See* Buckman; *Wise*, 221 F.3d at 148.

In *United States v. Reynolds*, 381 F.3d 404 (5th Cir. 2004), the defendant was in a dispute with a mortgage company over payment delinquencies. On October 31, 2001, he called a customer service representative and said, "I just dumped anthrax in your air conditioner." Reynolds subsequently was charged under section 2332a(a)(2), which prohibits threats that affect interstate commerce. He was convicted by a jury and sentenced to 51 months in prison. 381 F.3d at 405.

On appeal, the court noted that the term "threaten" was not defined by the statute itself and thus was to be given its "ordinary, contemporary common meaning." 381 F.3d at 406. According to Blacks Law Dictionary, a threat is "an expression of intention to inflict something harmful." *Id.* The court also looked to another "threat" statute, 18 U.S.C. section 875, which prohibits sending threatening communications in interstate commerce. *Id.* In that context, the Fifth Circuit had defined a "threat" as a communication that, "in its context would

have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* (internal citations omitted). *Reynolds* had argued that the explicit language of the statute applied only to threats of future actions – his threat claimed a prior use of anthrax. 381 F.3d at 405-06. The court rejected such a restrictive reading by relying upon the plain meaning of "threat." *Id.*

In another Fifth Circuit case, *United States v. Guevara*, 408 F.3d 252 (2005), the defendant also claimed use of anthrax, this time against a federal judge. The appellate court first addressed an issue similar to that raised in *Reynolds*: should the language of "threaten to use" be read in a restrictive way so as to contemplate only future use of a weapon of mass destruction? 408 F.3d at 256-257. The court again rejected a limited reading of the statutory language and upheld threats that may encompass past action. *Id.* A second legal issue in *Guevara* involved the jury instructions. The appellate court approved the following:

> A threat is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. It is not necessary to prove that the defendant actually intended or was able to carry out the threat made.

408 F.3d at 257-58.

These cases and the statutory language support the district court's analysis of the essential elements of Parr's offense, including whether Parr made a "true

threat." In addition, the district court's analysis of Parr's conduct was consistent with prior cases judging the issue of "threats" in a general context.[4]

Primary among these other cases is the Supreme Court decision in *Watts v. United States*, 394 U.S. 705 (1969). The case involved a criminal conviction of Robert Watts, who, at an anti-Vietnam war rally, stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court held that such a statement could not sustain a conviction for willfully threatening the life of the president (Lyndon Johnson) under section 871(a). The Court ruled that because of concerns for protecting First Amendment free speech, the prosecution had to prove that the words were "a true threat." 394 U.S. at 706. The Court said Watts was engaged in nothing more than political hyperbole. *Id*.

Not quite 20 years later, in *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986), the Seventh Circuit upheld a conviction of a defendant who sent a note to President Ronald Reagan reading: "Ronnie, Listen Chump! Resign or You'll Get Your Brains Blown Out." The appellate court noted the effect (and cost) of such threats on those charged with protecting the President and quoted Justice

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[4] The Seventh Circuit has noted that cases reviewing similar threat statutes are instructive in determining the scope and definition of what constitutes a "threat." *See United States v. Saunders*, 166 F.3d 907, 912-913, n. 4 (7th Cir. 1999).

Marshall in his concurring opinion in *Rogers v. United States*, 422 U.S. 35, 46-47 (1975):

> Plainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out. *Like a threat to blow up a building*, a serious threat on the President's life is enormously disruptive and involves substantial cost to the government. A threat made with no present intention to carry it out may still restrict the President's movements and require a reaction from those charged with protecting the President.

806 F.2d at 707 (emphasis added). The Seventh Circuit in *Hoffman* then adopted the Ninth Circuit's definition of a "true threat." The government must demonstrate that a defendant made a statement:

> . . . in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the speaker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of the President.

Id. (quoting *Roy v. United States*, 416 F.2d 874, 879 (9th Cir. 1969)).

In dissent, Judge Will traced case law to a conclusion that the focus of a "true threat" must be on the speaker's actions, not just on how specific words are interpreted by the recipient. 806 F.2d at 718-719. Judge Will argued that a "true threat" against the President should be judged in the context of corroborative evidence, such as:

(1) did the defendant have special knowledge of the President's movements, citing *Roy*, 416 F.2d at 874 (threat to president from marine who knew president was visiting military base the next day);

(2) did he prepare or have a detailed scheme to carry out the threat, citing *United States v. Hart*, 457 F.2d 1087 (10th Cir. 1972) (upholding conviction of threat combined with detailed plan to bring threat to fruition);

(3) were there post-arrest affirmations of intent to carry out the threat; citing *United States v. Vincent*, 681 F.2d 462 (6th Cir. 1982) and *United States v. Smith*, 670 F.2d 921 (10th Cir. 1982) (focusing on post-arrest conduct of person making threats as a way to judge seriousness of intentions);

(4) did the defendant have ownership or familiarity with guns or other weapons, citing *United States v. Carrier*, 708 F.2d 77 (2d Cir. 1983), which in turn cited *Rogers*, 422 U.S. 35 (threat combined with ready access to cache of firearms showed defendant's true intent); and

(5) did the defendant profess an intent to travel to the vicinity of the intended victim, citing *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983) and *United States v. Frederickson*, 601 F.2d 1358 (8th Cir. 1979) (upholding convictions

for threat against President when combined with plans to travel to Washington, D.C.).

806 F.2d at 718-719.

Another issue of debate in the courts has been whether a threat should be judged exclusively from the perspective of the speaker, exclusively from the perspective of the recipient, or some combination of both. According to the Seventh Circuit, there is no clear resolution. *Saunders*, 166 F.3d at 913-14, n. 6 (collecting cases); *see also Fuller*, 387 F.3d at 647 (adopting objective "true threat" test for threats against the President); *United States v. Geisler*, 143 F.3d 1070, 1071-72 (7th Cir. 1998) (offense of mailing a threatening communication did not require the actual receipt of the threat by the victim); and *United States v. McMorrow*, 2003 WL 22939362 (D.N.D. Dec. 11, 2003) (fact that defendant made threat while in jail did not mean he was incapable of making a true threat – especially since the defendant was scheduled to be released from jail in five days).

The disparity of views can be traced to the dilemma of the court in *Hoffman*: From one perspective (the majority), the statutes must encompass hoaxes (or similar threats to scare) since they have the same potential for disruption as threats made with the intent to carry them out fully. From the

other perspective (the dissent), the core purpose of the statutes is to protect against those with a true intention to carry out such threats.

As explained below, the government's theory of prosecution against Steven Parr fits into the category of persons with the true intention to carry out such a threat. Parr's threat was more dangerous because it was real: he was not trying to simply scare the occupants of the federal building. Thus, concerns over the outer reaches of "threat" statutes, particularly those cases involving political hyperbole or potential hoaxes, was not present. Moreover, in this case, the district court required the jury to find a "true threat" under both objective and subjective standards. *See* R. 157, Order at 2.

D. Parr's words and conduct were sufficient for a reasonable jury to find a true threat.

There was no dispute at trial that Parr did, in fact, verbalize a threat to blow up a federal building in Milwaukee. According to the district court, "The most convincing evidence against the defendant were his own words which unequivocally described a plan to use an explosive device to cause significant damage to the Reuss Federal Plaza and serious injury or loss of life to those that worked there." R. 157, Order at 3. The recorded words alone were sufficient for a jury to find that Parr expressed and intended to express a serious intention to blow up the federal building. Parr described how he scouted the federal building

in Milwaukee; noticed that the predominantly glass structure was located near a main thoroughfare; how delivery trucks could drive right up to the building; how Parr would obtain a delivery uniform; park a truck of explosives at the building; walk in, but then exit and run to safety. Parr also described how he planned to experiment with explosives ("refine his technique") before actually attempting to blow up the building.

At trial (as opposed to in his interview with the FBI), Parr did not deny stating such a message. Instead, Parr claimed his words were simply bravado, said in order to gain attention, and that he had no real intention of acting on his words. This position, however, was rejected by the jury, as well as the district court in the Rule 29 motion. *Id.*

On appeal, Parr goes further and argues that regardless of the fact that he voiced the words, he cannot be guilty as a matter of law because saying such words in the fashion he did cannot be a crime. In support, he contends: (1) that he was prodded by his cell mate into making the statements that he did; (2) no reasonable person would foresee his statements as serious in the context they were made; and (3) the words could not be a threat because they were not an

expression of an imminent intention to blow up a building.[5] Each of these arguments is without merit.

First, the question of whether Parr's cell mate prodded Parr into making the threat was one the jury was able to weigh and rightly discount. Under the evidence presented at trial, a jury was able to find that Parr's stated intention to blow up a building did not start with Parr's encounter with his cell mate. Long before meeting Schultz, Parr told others of his intention to follow in the footsteps of Timothy McVeigh. *See* Tr. 10, 16, 209-10.

Second, the fact that Parr communicated his threat to a cell mate does not mean that a reasonable person would, as a matter of law, reject Parr's statements as mere hyperbole. In fact, Parr's cell mate testified that Parr's words went well beyond the run-of-the-mill anti-government banter that takes place inside prison walls. Tr. 310. Parr gave a detailed description of his plan, including trading ideas with Schultz, who had his own background in chemistry. Tr. 309, 368. Moreover, the fact that Parr made his threat while in a prison cell does not establish as a matter of law that the threat should not be construed as serious; *see e.g. United States v. Cousins*, 469 U.S. 572 (6th Cir. 2006) (threat to President sent

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[5] Parr also contends that the statements were not a true threat because they were not communicated with intent to intimidate a victim. The government, however, did not pursue a theory of culpability based on this contention.

from jail cell); *United States v. McMorrow*, 471 F.3d 921 (8th Cir. 2006) ("declaration of war" sent from jail to various public officials); especially where, as in the case of Parr, he was to be released from jail the next day.

Third, the fact that Parr, in the course of describing his plan, said he may not execute it for 10 years does not mean that as a matter of law, he did not utter a true threat. Parr's own words established that the time line was subject to change:

> Schultz: So, I might not have to wait ten years? Is it possible?
>
> Parr: Absolutely.

Exh. 2A, at 6. Parr further stated that upon his release from prison, scheduled for the next day, he was going to spend his time refining his bomb-making techniques and perhaps search for a better target. *Id.* at 8. Thus, this was not a situation, as in *Watts*, 394 U.S. 705, where the defendant conditioned his threat on an outside event that may not take place ("if they ever make me carry a rifle . . ."). Parr's time frame was of his own making and was not so unconditional that a reasonable juror could not decipher his true intent. *Cf. United States v. Hale*, 448 F.3d 971, 982-83 (7th Cir. 2006) (finding sufficient evidence of threat to kill a judge even though, during secretly recorded conversation, defendant said at one point he did not want to be involved in illegal conduct).

In sum, the evidence solidly supports the jury's verdict and the district court's decision upholding that verdict.

II. The district properly admitted Rule 404(b) evidence.

Parr appeals the government's introduction of evidence that Parr sought to emulate Timothy McVeigh and the Unabomber; that Parr possessed books and other materials on how to make explosives and to attack government buildings; that Parr often experimented with explosives and constructed pipe bombs; and that Parr previously spoke of his desire to blow up a building. The introduction of this evidence and others similar to it was subject to pretrial briefing and a detailed written decision of the district court. *See* R. 135-1, Revised Decision and Order on Defendant's Motion to Exclude Rule 404(b) at 15-29. The district court admitted some evidence for the purpose of showing Parr's motive, knowledge, and intent, but denied the government's request to introduce all such evidence. *Id.* In addition, the district court limited the government's presentation of this evidence. For example, certain bomb-making books possessed by Parr were admitted in an oral summary, without the books themselves being given to the jury and without the title and extraneous details mentioned. *See, e.g.*, Tr. 64-67. The district court also reconsidered and reevaluated its rulings during the context of the trial; *see, e.g.*, Tr. 202-204, particularly when the jury, during deliberations,

made a specific request to actually see two of the books. Tr. 641. Finally, the district court explicitly instructed the jury that Parr was not on trial for any political views. *See* Tr. 635, 643.

A. Standard of Review

Although the evidence against Parr was evaluated under Rule 404(b), the same evidence was admissible as direct, intrinsic evidence of the defendant's acts in furtherance of the elements of a section 2332a violation. *See United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 50-51 (1st Cir. 2004). An essential element of a section 2332a offense is that the defendant's threat "was a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person." *Guevara*, 408 F.3d at 257-58. Proof of the defendant's true intentions was not limited to the words themselves and may come from a variety of surrounding circumstances. *See Hoffman*, 806 F.2d at 707. Still, the evidence also was correctly admitted by the district court as evidence of Parr's knowledge, motive and intent.

This Court has set forth a four-part test to determine the admissibility of evidence under Rule 404(b). *United States v. Gellene*, 182 F.3d 578, 594-96 (7th Cir. 1999). The evidence is admissible if: "(1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit

the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Id.*, citing *United States v. Asher*, 178 F.3d 486, 491 (7th Cir. 1999). This Court will not disturb the court's ruling absent an abuse of discretion. *Hale*, 448 F.3d at 985. "We give special deference to the district court's assessment of the balance between probative value and prejudice because the court is in the best position to make such assessments." *Id.*

B Matter in Issue

When the defendant is charged with a specific intent crime, the government is permitted to use other acts evidence to prove the defendant acted with the requisite intent. *Gellene*, 182 F.3d at 595. This is particularly so when the defendant himself makes intent an issue. *Id.*

Parr was charged with threatening to use a weapon of mass destruction against a federal building, in violation of Title 18, United States Code, section 2332a. "Threat" allegations are specific intent: the defendant must evidence a "true threat." *See Watts*, 394 U.S. at 708 (threat against president must be "true threat" considered within context); *Hoffman*, 806 F.3d at 707 ("true threat" is

statement that within context would lead reasonable person to interpret communication as serious threat of bodily harm).

In addition, Parr put his mental state in issue with a filing under Fed.R.Crim.P. 12.2(b). R. 47. Parr indicated that he would introduce (and ultimately did introduce) expert testimony regarding his "mental health history, current condition, and condition at the time of the offense as they impact on the defendant's state of mind at the time of the offense and the elements which are required to be proved by the government." Parr Rule 12.2(b) Notice; *see also* Tr. 318-330, 433-447 (testimony of psychiatrist and defendant's brother that Parr was nothing more than a braggart, simply seeking attention from others through his outrageous statements). Therefore, Parr's state of mind – his motive, intent, preparation, plan and knowledge – was a critical matter at issue for his trial.

C. Unfair Prejudice

Parr contends the evidence should have been excluded because the probative value of this evidence was outweighed by the potential prejudicial effect. As a general matter, however, all evidence is prejudicial to a defendant, especially evidence that shows guilt. *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991). That is not a proper basis for excluding evidence. For example, in a white-collar case, a district court may not exclude evidence of an embezzlement

simply because the money was spent in an outrageous fashion. *United States v. Mobley*, 193 F.3d 492, 495 (7th Cir. 1999) (reversing district court's exclusion of such evidence). As this Court noted, "An embezzler who spends the proceeds on a yacht or a mistress can't by that step prevent the jury from learning that his budget was out of balance." *Id.* The same holds in a prosecution for a potential egregious violent crime such as that committed by Parr. *See Hale*, 448 F.3d at 985-86 (upholding admissibility in threat case of defendant's favorable comment of person who previously went on shooting rampage). Almost all evidence against the defendant in this context carries the potential for an emotional reaction from the jury, but that stems intrinsically from the nature of the defendant's crime. That situation alone does not establish a substantial danger of unfair prejudice.

The evidence challenged by Parr was the evidence that most established his true intentions, for it is that same proof that establishes the "true threat." A defendant with knowledge of chemicals and explosives who makes a threat to blow up a federal building certainly would be differentiated from one who makes the same threat but has no knowledge of how to construct an explosive device. So too, a defendant who has sought to imitate Timothy McVeigh or Ted Kaczynski and possesses terrorist manuals certainly should be viewed differently

from a person who makes a one-time, vague verbal threat at the federal government.

Similar bombing cases provide guidance for the Court in balancing the probative value of the evidence with the risk of unfair prejudice. In *United States v. Walters*, 351 F.3d 159, 165-67 (5th Cir. 2003), the court approved the admissibility of the Anarchist Cookbook in a prosecution of a defendant for making and sending a bomb to a person he blamed for his discharge from the military. The court found portions of the book "highly probative" and not unfairly prejudicial. *Id.*

In *United State v. Yousef*, 327 F.3d 56, 121-122 (2d Cir. 2003), the court in a bombing conspiracy case evaluated the admissibility of written statements made by the defendant of his desire to kill Americans. The court found that the statements were probative of the defendant's motives for undertaking such serious conduct: he wanted to retaliate against the United States for its support of Israel. That same case upheld the admissibility of evidence of the defendant's threats against persons in other countries that supported Israel. *Id.*

In *United States v. Stotts*, 176 F.3d 880, 890-91 (6th Cir. 1999), a prosecution for exploding a destructive device during a drug offense, the court considered the admission of "pipes, end caps and various bomb-making books" found in the

defendant's residence. The court held that the evidence was "clearly relevant" and was not impermissibly admitted under Rule 404(b). *Id.*

E. Anarchist Cookbook

Parr raises specific, additional arguments regarding the Anarchist Cookbook and the fact that the district court allowed the book to go to the jury. Parr cites, among other cases, *United States v. Rogers*, 270 F.3d 1076 (7th Cir. 2001), for the proposition that admissibility of this particular book is error if done to show that the defendant was simply someone who believed in dangerous ideas. The potential unfair prejudice of the admissibility of this book was recognized by the district court in this case, and the court (based on the *Rogers* precedent) initially restricted the government from mentioning irrelevant portions. R. 135-1, Revised Decision and Order on Defendant's Motion to Exclude Rule 404(b) Evidence, at 25. The district court also initially ruled that the jury could not view the book itself. *See* Tr. 61, 631-32. During jury deliberations, after a specific request from the jury, the court reconsidered and allowed them to see the book. Tr. 640-44.

By that point, the book had become more than simply another bomb-making reference book previously possessed by Parr. First, on the tape recorded jail conversation, Parr had cited the Anarchist Cookbook as a specific source for

learning about bomb-making. Tr. 55. Second, Parr introduced expert testimony that, despite the taped-statement, as well as the fact that Parr possessed other bomb-making books and literature, Parr was mentally unable to construct a large explosive device. Tr. 413-14. Third, Parr testified that he had never built any explosive device bigger than a one-inch firecracker. Tr. 474. Fourth, Parr testified that he said inflammatory things as a manner of drawing attention to himself. Tr. 475. Finally, Parr's counsel in closing had argued that based on all these facts, Parr's words were not a threat because Parr did not intend to be taken seriously. Tr. 595-97.

At that point, and only at that point, did the district court allow the jury to actually see the Anarchist Cookbook. The court reasoned that the probative value of the book substantially outweighed its prejudicial effect, particularly in light of the defense that had been put forward. Tr. 640-43. The defendant had put in issue the seriousness of his stated intention to blow up a federal building, as well as his ability to execute such a plan. The Anarchist Cookbook contained instructions on how to build a bomb large enough to destroy a building – "a recipe," according to the district court. *Id.* Therefore, despite the extraneous contents, the jurors were entitled to examine these bomb-making instructions and

infer Parr's actual knowledge of how to make a large explosive device, as well as his motive for possessing such "recipes." *Id.*

Parr's objection to the Rule 404(b) material sought to eliminate from the government's case the most probative evidence of Parr's true threat. His motions attempted to isolate his threat from the prior conduct that demonstrated the threat to be so serious. The district court gave the matters detailed consideration and conditionally admitted only portions of the evidence. The court further instructed the jury on the limited purpose of the evidence. Tr. 572 ("The Defendant is not on trial and may not be convicted for his political views."). In the end, the district court properly weighed the evidence in the context of the charge, the government's evidence, and the defense Parr presented. The district court did not abuse its discretion in allowing the government to present this evidence.

III. The district court did not commit plain error by mistakenly referring to the defendant as "Mr. McVeigh."

As discussed above, the parties prior to trial made detailed and repeated arguments to the district court on the admissibility of Parr's stated intention to emulate Timothy McVeigh. The district court ultimately allowed the government to introduce this evidence, R. 135-1 Order at 28, which the government did, in part, through the testimony of Parr's former girlfriend, Louise Olson.

On direct examination, Olson told the jury that Parr spoke often of McVeigh and sat for hours watching television around the time of McVeigh's execution. Tr. 10. At one point during Olson's testimony, however, the district court sustained an objection when Olson testified that Parr "felt bad" when McVeigh was executed. *Id.* The court upheld the defense contention that the witness could not testify as to what the defendant felt. *Id.* On cross-examination, Parr's counsel sought to further explore how the witness had construed Parr's statements about McVeigh and the Unabomber (Ted Kazynsky). *Id.* at 12. At that point, the court interrupted and said:

> I'm going to interrupt here, because I'm worried I may have confused the witness. You're asking her how she knows things. And if she knows of something other than from Mr. McVeigh, she can say that.

Tr. 13.

At that point, the prosecutor corrected the judge by pointing out that the judge meant to say, "Mr. Parr." The judge immediately noted his mistatement and apologized for the mistake. *Id.* The testimony continued without objection by Parr's counsel. *Id.* On appeal, Parr contends that this slip-of-the-tongue by the presiding judge tainted the entire trial and deprived Parr of his right to a fair trial.

Because Parr failed to raise an objection during this exchange, review on appeal is limited to "plain error" analysis. *Hale*, 448 F.3d 987. Parr must show that the district court error was clear and obvious and affected his right to a fair trial. *Id.* This Court evaluates the questions or comments of a presiding judge under a two-step inquiry: (1) whether the judge did, in fact, convey a bias in front of the jury; and (2) if so, whether the comment or question seriously prejudiced the result of the trial. *United States v. Washington*, 417 F.3d 780, 784 (7th Cir. 2005).

Parr can show neither with respect to the trial judge's mistake. In the context of an objection on the admissibility of testimony on Parr's statements regarding Timothy McVeigh, the judge mixed up the two names. The mistake was a one-time error that was immediately corrected. No other evidence of bias existed; nor could this mistake have impacted the end result, since Parr himself agreed that he had linked himself to McVeigh. Parr testified that he had spoken of McVeigh "in a positive light" and did so for "the shock value." Tr. 510-12. Finally, the district court repeatedly admonished the jury that Parr could not be

convicted solely because of an admiration for McVeigh or other similar belief.[6] Tr. 572, 635. Thus, no plain error existed.

IV. The district court properly admitted expert testimony to explain Parr's technical descriptions of explosive materials and to opine on Parr's ability to construct a large explosive device.

Next, Parr argues that the district court improperly allowed the government to admit expert testimony regarding whether Parr had demonstrated an ability to construct a large, destructive explosive. An expert from the FBI testified that Parr is a person "capable, after some practice, of assembling a vehicle bomb that would be capable of creating property damage, death, and possibly death to his intended target, which is the Federal Building." Tr. 362. The expert also explained some of the terms Parr used on the recorded conversation. Tr. 362-65.

Parr contends that the testimony was allowed "over his objection," but no specific objection is cited, nor does his appendix contain any excerpt in the record

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[6] In his appeal brief, Parr relies on *United States v. Van Dyke*, 14 F.3d 415 (8th Cir. 1994) for the proposition that a new trial was warranted when the district court remarked, "I sort of drifted away. What was the question?" But a fuller reading of *Van Dyke* indicates that the comment was but one of many where the district court repeatedly interrupted trial counsel and, later, impeached the witness and bolstered the government's case. 14 F.3d at 418. The case does not support the contention that an isolated misstatement by a trial judge, standing alone, should cause a new trial.

where the district court was squarely presented with a defense contention that such testimony should be excluded. To the contrary, at trial, Parr's counsel did not object to the government's expert. Tr. 361. Moreover, Parr's defense relied heavily on his own expert's opinion that Parr was not capable of constructing a large explosive device and therefore his words should not be taken seriously. Tr. 413-14.

In any event, no error – plain or otherwise – was committed by the district court in allowing this testimony. Under Fed.R.Evid. 702, the district court has broad discretion to allow expert testimony if such specialized knowledge would assist the trier of fact. *United States v. Davis*, 471 F.3d 783, 788-89 (7th Cir. 2006); *United States v. Lundy*, 809 F.2d 392, 394-5 (7th Cir. 1987). As set forth in detail above, the key issue in dispute at trial was whether Parr's stated plan to blow up a federal building was a "true threat." The defense contended that Parr had no detailed knowledge of explosives and was simply putting forth false bravado. His words on the recorded conversation, however, contain detailed, highly technical descriptions of explosive material: mercury fulminate, Trinitrobenenzine, oxidizers, urea nitrate. *See* Exh. 1A; *see also* Tr. 362-65. Parr also discussed the various necessary components of a large explosive "train": the detonator, the booster, and the main charge – but not without certain technical

errors. Tr. 365. Given that these terms and topics have no common or lay meaning, and the average juror would have no way to assess the defendant's words, the district court properly admitted expert testimony explaining these terms and the conclusion (disputed by Parr's expert) that Parr was, in fact, capable of constructing an explosive device that would destroy a federal building in Milwaukee.[7]

V. The district court properly calculated the advisory Guidelines, but acted unreasonably in reducing Parr's sentence to 120 months from the advisory range of 360 months to life based on the court's view that imposition of the terrorism enhancement, U.S.S.G. section 3A1.4(a), overstated the seriousness of the offense.

A. Standard of Review

This Court reviews a district court's sentence for reasonableness. *United States v. Booker*, 543, U.S. 220, 260-63 (2005). "Whether a sentence is reasonable depends upon its conformity to the sentencing factors set forth in 18 U.S.C. section 3553(a)(2)." *United States v. Cunningham*, 429 F.3d 674, 675 (7th Cir. 2005). Although not binding, the Sentencing Guidelines still provide an important backdrop for judging on appeal whether a sentence is reasonable: the guidelines

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[7] Parr further contends that the accumulation of the district court's erroneous evidentiary rulings, combined with the court's mistaken reference to "Timothy McVeigh," created a cumulative effect that deprived him of a fair trial. *See United States v. Anderson*, 450 F.3d 294, 301 (7th Cir. 2006); *United States v. Eberhart*, 434 F.3d 935 (7th Cir. 2006). As set forth above, the district court's determinations were not erroneous and did not unduly prejudice the defendant.

"remain an essential tool in creating a fair and uniform sentencing regime across the country." *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

"[T]he basic methodology that must be employed by a district court in sentencing a defendant is now well-settled." *United States v. Jointer*, 457 F.3d 682, 685 (7th Cir. 2006) (citing *United States v. Walker*, 447 F.3d 999, 1007 (7th Cir. 2006)). In a post-*Booker* setting, although the Sentencing Guidelines are advisory, the sentencing court must first make an initial calculation of the applicable range. *Id.* "At this stage of the process, a district court must acknowledge, and abide by, the policy choices made by Congress and the Sentencing Commission." *Id.* After doing so, the court then must turn to the factors of 18 U.S.C. section 3553(a) to determine whether a sentence should be inside or outside of the advisory guideline range. *Id.* at 6.

The appropriateness of a sentence outside the guideline range is reviewed by this Court under a two-prong analysis: (1) whether the district court's choice of sentence is adequately reasoned in light of the section 3553(a) factors; and (2) whether the sentence ultimately can be deemed a reasonable one. *United States v. Wallace*, 458 F.3d 606, 609 (7th Cir. 2006). "At each point, the focus is on what the district court did, not on what it might have done. Thus, the procedural inquiry focuses on the actual reasons given, not on whether the sentence could have been

supported by a different rationale; the substantive inquiry looks at the sentence imposed, not at all the other hypothetical sentences that might have been chosen." *Id.*

Under step one, the appellate court examines the strength of the district court's reasoning in light of the extent of variance from the sentencing guideline range. *Id.* "[T]he farther the judge's sentence departs from the guidelines sentence (in either direction-that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *Id.* (citing *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005)). Under step two, the "reasonableness" of a sentence is reviewed under objective criteria. *Id.* at 609-612. For sentences outside the guideline range, the district court must base its sentence on individualized factors for the particular case at hand. *Id.* at 611.

B. The district court properly applied the obstruction enhancement of section 3C1.1.

The district court applied a two-level Sentencing Guideline enhancement to Parr's guideline range under section 3C1.1 based on a finding that Parr perjured himself at trial. Sent. Tr. 19-20. Parr argues that the district court failed to set forth a sufficient record of what constituted Parr's false testimony.

Under section 3C1.1 of the Sentencing Guidelines, a defendant who perjures himself at trial commits obstruction of justice warranting the two-level enhancement. *United States v. Harrison*, 431 F.3d 1007, 1012 (7th Cir. 2005). The district court's finding under this section of the guidelines is a factual determination, reversed only for clear error. *Id*.

At the time of his arrest, when Parr did not know that his jail house conversation had been recorded, Parr denied making any statement about a plan to blow up a federal building. Tr. 75-78. He specifically disputed making statements regarding a detailed plan. *Id.* At trial, after the recorded conversation had been played for the jury, Parr testified that he had, in fact, admitted to the FBI that he talked to his cell mate about blowing up a building. Tr. 531-32. Parr testified that he told the FBI he did not actually mean to carry out such a plan: "I said it wasn't real; I didn't mean it. It wasn't real." Tr. 533. In rebuttal, the FBI agent who interviewed Parr said Parr never gave any such explanation during their interview. Tr. 535. In finding that Parr had perjured himself, the district court specifically cited Parr's trial testimony on this point. Sent. Tr. 19. Because the district court cited to specific trial testimony, that testimony related to a critical issue, and there was a solid basis to find that testimony was false, the district court properly applied the enhancement under section 3C1.1.

C. The district court properly applied the terrorism enhancement of section 3A1.4.

Section 3A1.4 of the Sentencing Guidelines provides that if "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism," the applicable guideline range is to be increased 12 levels or to a minimum of level 32 and the criminal history category is to be moved to VI. A "federal crime of terrorism" is one listed in 18 U.S.C. section 2332b(g)(5). *See* U.S.S.G. section 3A1.4, Application Note 1.

The legislative history of section 3A1.4 was examined in detail in the dissenting opinion of Judge Cohn in *United States v. Graham*, 275 F.3d 490, 529-537 (6th Cir. 2001). The enhancement has its roots in proposed 1991 legislation that became law in 1994. Congress directed the Sentencing Commission "to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." *See* 275 F.3d at 530-31 (citing the *Violent Crime Control and Law Enforcement Act of 1994*, Pub.L. 103-322, Title XII, section 120004).

In 1995, in the wake of the Oklahoma City bombing, "international terrorism" was changed to simply "terrorism." *See* 275 F.3d at 532-34, 538 (citing the Antiterrorism and Effective Death Penalty Act of 1996 Pub.L. 104-132, 110

Stat. 1214). The Sentencing Commission responded with section 3A1.4, which it viewed as a substitute for section 5K2.15. *See* commentary to amendment 526. Section 5K2.15 provided a basis for an upward departure for offenses having terroristic motives (though even section 5K2.15 noted that such an enhancement was available even before then under section 5K2.9: criminal purpose). Thereafter, the impact of section 3A1.4 expanded and contracted with congressional changes in what constituted a terrorism offense.[8]

In *United States v. Hale*, 448 F.3d at 988, this Court upheld the 12-level increase of section 3A1.4 for a white supremacist plotting to kill a federal judge. The decision does not contain a detailed analysis of section 3A1.4, but rather reiterated the holding of *United States v. Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005), that section 3A1.4 not only applies to terrorism offenses, but also the broader class of felonies where the purpose of the defendant was to promote terrorism.

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[8] After tracing this history, Judge Cohn concluded that the "history of the evolution from no guideline on a crime of terrorism to the present language of section 3A1.4 should be limited to a conviction of one of the enumerated [terrorism] offenses in 18 U.S.C. section 2332b(g)(5)(A)." 275 F.3d 490. This conclusion, however, was rejected by the majority in *Graham*, as well as by a subsequent panel of the Seventh Circuit. See *United States v. Arnaout*, 431 F.3d 994, 1000-01 (7th Cir. 2005).

In Parr's case, the district court properly found that the plain wording of section 3A1.4 required the 12-level enhancement. Sent. Tr. 31-33. Parr's conviction under 18 U.S.C. section 2332a was one of the statutes listed in 18 U.S.C. section 2332b(g)(5) and incorporated into section 3A1.4(a). In addition, according to the district court, Parr's threat involved "a plan or a threat to influence or affect government by intimidation or coercion or retaliate against government conduct." *Id.* at 32.

This finding was supported by Parr's own description of his motivation, as captured on the secret FBI recording: Parr wanted to blow up a federal building, just like Timothy McVeigh, in order to "change the attitude of the country" and "make a wonderful statement." Exh. 2A at 3. Parr further explained:

> I hope it'll make people aware. I hope others will say, wow, he can stand up and make a statement like that? I may not be as radical as him, but I surely agree with him and it might unite more people. It might generate some people to stand up and say, you know what? Enough is enough.

Id. at 7. Given this statement of Parr's motivation, the district court properly applied section 3A1.4. That guideline set Parr's offense level at 38 and criminal history category at VI. The resulting range was 360 months to life. Sent. Tr. 33.

D. The district court erred in sentencing Parr 240 months below the minimum range.

Despite imposing this enhancement, the district court deviated 66% from the resulting minimum guideline sentence and imposed a term of 120 months. In so doing, the district court noted that the guideline range of section 3A1.4 did not distinguish between whether Parr actually intended to or was capable of carrying out his threat. Sent. Tr. 62. "That's the difference, it seems to me, between night and day," the judge said. *Id.* at 62-63. The court found that the evidence was "unclear" as to whether Parr was capable of carrying out his threat or whether he simply issued a threat that he wanted people to believe. *Id.* at 63. Moreover, the court noted, even if Parr intended to carry out his threat, his time frame left him an opportunity to change his mind – Parr said he might wait 10 years to bomb the building. *Id.* at 64-65. Given this ambiguity, the court found that the policy considerations of section 3A1.4 did not apply. *Id.* at 70.

The district court's analysis is erroneous for the following reasons. First, the challenge to the "policy considerations" of section 3A1.4 improperly substitutes the district court's view of the seriousness of Parr's offense for that put forward by the Sentencing Commission. *Cf. United States v. Thomas*, – F.3d –, 2006 WL 3771029 (7th Cir. Dec. 22, 2006); *United States v. Jointer*, 457 F.3d at 686 (district court could not substitute its judgment for Sentencing Commission on

crack-powder guideline disparity). Second, the guidelines do not require that a defendant actually complete a terrorism offense in order to receive the enhancement. Had a defendant actually exploded a bomb at a federal building and killed someone, his offense level would have started at 43 (life imprisonment) even before the terrorism offense enhancement. *Cf.* U.S.S.G. section 2A1.1. Third, and most importantly, the district court failed to give any weight under section 3A1.4 to Parr's actual history with explosives. Parr had proven bomb-making capabilities, was obsessed with explosives, repeatedly expressed hatred for the government, and idolized Timothy McVeigh and the Unabomber. This was not a person who simply bragged about something he would not be able to accomplish. Parr established himself as a significant, ongoing risk. Under these circumstances, a 66% deviation from the guidelines was unreasonable.

VI. Parr's sentence did not violate the Sixth Amendment right to a jury trial.

In a final, cursory argument, Parr cites the recent Supreme Court case of *Cunningham v. California*, 127 S. Ct. 856 (2007) for the proposition that the Supreme Court "is concerned about the constitutionality of post-*Booker* sentencing, particularly in Circuits such as this one, where Guideline sentences are accorded a 'presumption of reasonableness' on appeal." Appellant Br. at 52-

53. Parr then jumps to the conclusion that his sentence violated the Sixth Amendment because enhancements were applied without explicit findings from a jury.

The premise and conclusion put forth by Parr do not follow. *Cunningham* involved a challenge to a California sentencing scheme. The Court reviewed the history of cases leading to *Booker*, but in no way overturned its holding, particularly the *Booker* fix which made the guidelines advisory in order to protect against a Sixth Amendment violation. See 127 S. Ct. at 856 . Moreover, the Court cautioned against predicting future holdings of *Booker*-related appeals, particularly those upcoming cases reviewing the "reasonableness" standard of review. 127 S.Ct. at 867, n. 13. Under the current holdings of the Supreme Court, Parr's sentence complied with the *Booker* decision and did not violate the Sixth Amendment.

CONCLUSION

Based on the foregoing, Parr's conviction should be affirmed. Parr's sentence, however, should be reversed and remanded for imposition of a sentence within the advisory guideline range.

Dated at Milwaukee, Wisconsin, this ____ day of _____, 2006.

Respectfully submitted,

STEVEN M. BISKUPIC
United States Attorney

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify, pursuant to Circuit Rule 32(a)(7)(B)(i) that this brief complies with the type volume limitations in Circuit Rule 32(a)(7)(B)(i) because it contains 12,237 words according to the word processing system used to prepare the brief.

I hereby certify that on March 20, 2007, an original and fourteen (14) hard copies of the Brief and ten (10) hard copies of the Appendix to Brief of Plaintiff-Appellee/Cross-Appellant were mailed to Gino J. Agnello, Clerk of Court, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Room 2722, Chicago, IL 60604; that the appendix materials to the brief are not available in "non-scanned" PDF electronic format, and, as a result, the PDF version of the brief, but not the appendix materials, was uploaded via the Internet pursuant to Circuit Rule 31(e); that two (2) hard copies of the Brief, one (1) hard copy of Appendix and a diskette containing the Brief of Plaintiff-Appellee/Cross-Appellant were mailed to Abner J. Mikva, Edwin F. Mandel Legal Aid Clinic, University of Chicago Law School, 6020 South University Avenue, Chicago, IL 60637-2786; and further that all parties required to be served have been served.

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STEVEN M. BISKUPIC
United States Attorney

CIRCUIT RULE 30(d) CERTIFICATION

The undersigned hereby certifies that I have complied with, and bound within the Appendix, excerpts from the record as permitted by Circuit Rule 30(a), (b) and (c).

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STEVEN M. BISKUPIC
United States Attorney